Supreme Court, U.S.
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NO. 94-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JACK WARD THOMAS, CHIEF,
UNITED STATES FOREST SERVICE, *ET AL.*,

Petitioners,

v.

PACIFIC RIVERS COUNCIL, *ET AL.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The following questions presented correspond more accurately than those in the petition to the record before and the decision of the court of appeals.

1. Whether the Forest Service had to reinitiate consultation on two forest plans upon the listing of the Snake River chinook in addition to promising consultations on future plan amendments and site-specific activities, where the Forest Service was proceeding with forest plan activities that could adversely affect the salmon prior to completing any form of consultation?

2. Did the court of appeals err in remanding the case to the district court to determine whether to enjoin, during the forest plan consultation process, various forest activities that may adversely affect the newly listed Snake River chinook?

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should deny the petition for a writ of certiorari because subsequent developments have rendered the case moot. This case sought consultation on the Umatilla and Wallowa-Whitman Land and Resource Management Plans (LRMPs or forest plans), and those consultations are now complete. The questions presented by the petition are so intertwined with the specific facts of this case that they are unlikely to recur. Review by this Court would offer little or no guidance to lower courts addressing potential future cases.

To compound matters, the petition's second question was neither presented to nor decided by the court of appeals and is still percolating through the lower courts on remand. It is premature and unnecessary for this Court to offer its views on the issue.

Justiciability defects aside, this case does not warrant review. In the courts below, the Forest Service admitted the need to revise its LRMPs and to consult on the effects of its ongoing activities on the newly listed salmon. Nonetheless, the agency went forward with numerous projects that it admitted could adversely affect the fish before completing any revisions or consultations. Because no other consultations had yet taken place, the forest plan consultation required by the court of appeals was neither duplicative nor meaningless.

The court of appeals' decision is well grounded in the applicable statute, the regulations and practice of the federal agencies charged with implementing the statute, and prior case law. In the end, the forest plan consultation assessed actions that the expert agency found critical to the salmon's survival, but that escaped review in other consultations. In light of these factors, the petition should be denied.

REGULATORY PROVISION INVOLVED

50 C.F.R. § 402.16 is reprinted at App., *infra*, 1a.

STATEMENT OF THE CASE

After reviewing the relevant statutory and regulatory provisions, this statement describes the posture of the case as it was presented to the court of appeals and as it has evolved since the court of appeals' decision.

I. THE ESA REQUIRES THE INPUT OF THE EXPERT FISH AND WILDLIFE AGENCY BEFORE POTENTIALLY HARMFUL ACTIVITIES MAY PROCEED.

This case involves the consultation process mandated by Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2). The core feature of that process is that it ends only when the expert fish and wildlife agency completes its evaluation and provides its views to the action agency.

Section 7(a)(2) requires that every federal agency "shall, *in consultation with and with the assistance of the Secretary*, insure

that any action authorized, funded or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species...." 16 U.S.C. § 1536(a)(2) (emphasis added).[1] The expert fish and wildlife agencies play a central role in this process by issuing the biological opinions that conclude the consultation. 16 U.S.C. § 1536(b). If NMFS or the FWS concludes that an action is likely to jeopardize a listed species, it must suggest reasonable and prudent alternatives that would avoid that result. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). If no jeopardy is found, NMFS or the FWS must still impose reasonable and prudent measures to minimize the incidental take of listed species and may suggest conservation measures to assist the action agency in reducing or eliminating impacts to the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(6)-(7).

NMFS and the FWS have adopted joint regulations elaborating on the ESA consultation process. *See* 50 C.F.R. Part 402. The regulations require that "[e]ach federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). If the agency determines that its action "may affect" the listed species, it must normally undertake formal consultation with NMFS or the FWS. *Id.* The regulations reiterate that this consultation concludes with the issuance of a biological opinion by NMFS or the FWS to the action agency. 50 C.F.R. § 402.02 (definition of "formal consultation").

Under certain circumstances, the regulations permit an agency to proceed with informal consultation. 50 C.F.R. §§ 402.13(a), 402.14(b)(1). Informal consultation commences when an agency determines that its action is "not likely to adversely affect" a listed species and concludes only when NMFS or the FWS concurs, in writing, with this determination. *Id.* If NMFS or the FWS does not concur, then the action must undergo formal consultation. 50 C.F.R. § 402.14(a).

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[1] The Secretaries of the Interior and Commerce, which share responsibility for implementing the ESA, have delegated their ESA authorities to the United States Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), respectively.

In short, the consultation process prescribed by the statute and the regulations is a closed loop, ending only when the expert fish and wildlife agency provides its assessment of the effects of an agency action. The Forest Service cannot discharge the consultation obligation on its own. It must obtain either a biological opinion or the expert agency's written concurrence in a "not likely to adversely affect determination."

One key regulation, 50 C.F.R. § 402.16, overlooked almost entirely by the petition, prescribes when consultation must be reinitiated for an ongoing or continuing action:

> Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:
>
> . . .
>
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

In biological opinions on other LRMPs, the FWS has noted that this regulation requires reinitiation of consultation when a new species is listed that may be affected by the forest plan. *E.g.*, Amendment to Biological Opinion on Flathead National Forest Plan and Amendments at 31 (July 18, 1989) ("Flathead BO").

II. THE FOREST SERVICE HAD COMPLETED ALMOST NO CONSULTATIONS ON FOREST ACTIVITIES AT THE TIME THE COURT OF APPEALS RULED.

A. *Forest Plan Decisions May Adversely Affect Endangered Salmon.*

Under the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, the Forest Service must "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a). These LRMPs "establish management

standards and guidelines [and] determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management." 36 C.F.R. § 219.1(b). Each LRMP establishes the rules for managing a particular forest for up to 15 years, 16 U.S.C. § 1604(f)(5), and must provide adequate direction to ensure the viability of species, particularly endangered and threatened species, protect plant and animal diversity, and conserve soil and water resources. 16 U.S.C. § 1604(g)(3); 36 C.F.R. § 219.27.

Each LRMP makes three basic decisions that have continuing effects on the management of forest resources. First, the LRMP divides forest lands into management areas that protect or promote different uses of forest resources. The LRMP opens some lands to logging and grazing and places others in wilderness or other protective regimes. 16 U.S.C. § 1604(g)(2)(A), (k). For example, prior to listing of the Snake River chinook, the Wallowa-Whitman LRMP allocated less than 60,000 acres to "anadromous fish emphasis," which constrains logging, grazing, and road-building, and over 700,000 acres to management primarily for timber production. Gov't Excerpt of Record (ER) 84A at 4-56, 4-94.

Second, the plans set goals for production of various forest commodities. The LRMPs project timber volumes and livestock forage levels for each year of the plan's life and schedule specific logging, grazing, and road-building activities to meet these goals. *Id.* at 4-5 & App. A, C.

Third, the plans establish forest-wide and management area standards and guidelines that regulate the manner in which logging, grazing, and other activities will be conducted. Among other objectives, the standards and guidelines protect habitat needed to ensure species' viability and diversity. *Id.* at 4-22 (aquatic habitat and water quality protection); 16 U.S.C. § 1604(g)(3); 36 C.F.R. 219.27.

All site-specific activities in the forest must comply with the LRMP. 16 U.S.C. § 1604(i). Decisions made in the LRMP generally are not revisited at the project level. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992). Instead, the core decision at the project level is whether the action is consistent with the forest plan and achieves forest plan goals.

The Forest Service adopted LRMPs for the Umatilla and Wallowa-Whitman National Forests in 1990. At that time, the Forest Service consulted with the FWS regarding the plans' effects on threatened bald eagles and peregrine falcons.

Two years after adoption of the LRMPs, NMFS added the Snake River spring/summer chinook salmon to the list of threatened species. 57 Fed. Reg. 14653 (Apr. 22, 1992).[2] The Forest Service acknowledges that it must consult with NMFS on the effects of its ongoing projects on the chinook. Petition at 17 n.12. Throughout this case, the agency also "has recognized that adjustments to the forest plans to address the newly listed species are warranted." Brief for the Appellees at 19 (9th Cir. Feb. 16, 1994).

B. *The Forest Service Proceeded With Potentially Harmful Activities Without Completing Any Consultations With NMFS.*

In its petition, the Forest Service provides a laundry list of actions which, it contends, make consultations on the existing LRMPs unnecessary and duplicative. Virtually none of these actions had been implemented or received NMFS approval prior to the court of appeals' decision. Rather, the Forest Service continued with logging, grazing, and road building projects under the outdated direction of the existing LRMPs without obtaining NMFS' opinions on how to modify the plans or the projects to ameliorate their adverse effects on the endangered salmon.

For example, the Forest Service raises its proposal to develop conservation strategies for the 11 major anadromous watersheds in the Umatilla and Wallowa-Whitman National Forests and to consult with NMFS on the completed strategies. Petition at 8, 22 n.16. The Forest Service notes that it completed a prototype strategy for one watershed in October 1992. *Id.* However, the agency has neither adopted nor ever obtained

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[2] NMFS since has published an interim emergency rule reclassifying the chinook as endangered, 59 Fed. Reg. 42529 (Aug. 18, 1994), and a proposed rule to make this reclassification permanent, due to continued, dramatic population declines. 59 Fed. Reg. 66784 (Dec. 28, 1994).

NMFS' assessment of *any* watershed conservation strategy, including the prototype.

The Forest Service also notes its development of an interim strategy, known as PACFISH, for managing anadromous watersheds in the interior Columbia Basin. *Id.* at 22-23 & n.16.[3] Again, at the time the court of appeals ruled, the Forest Service had not adopted or completed consultation on this strategy and had not committed to taking these steps by a date certain. Nor had the Forest Service assured the court or the parties that PACFISH would address all inadequacies in the existing LRMPs.

The agency further emphasizes that it was consulting on site-specific projects taking place pursuant to the LRMPs, either individually or grouped by watershed. Petition at 21 n.16. This is only half the story. For the vast majority of ongoing and announced projects — those that the Forest Service determined were "not likely to adversely affect" the salmon (NLAA projects) — the agency did not wait for NMFS' biological opinion or written concurrence before proceeding. As of July 1993, the forests had completed at least 20 timber sales and 10 new roads and continued their grazing programs without completing *any* consultation with NMFS on those projects, even though the Forest Service had determined these activities could affect listed salmon. Pet. App. 6a n.6.. Since NMFS' concurrence is required to conclude the consultation process, 50 C.F.R. §§ 402.13(a), 402.14(b)(1), the Forest Service's unilateral designations did not discharge its duty to consult with NMFS on those projects.

The Forest Service continued this practice even after NMFS disagreed with several of its "not likely to adversely affect" determinations. *See* LRMP BO at 40 (tabulating NMFS

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[3] PACFISH adds interim salmon protections to the existing LRMPs while the Forest Service develops two longer-term ecosystem management plans for the Columbia Basin. The Forest Service presently projects that it will complete the longer-term plans in mid-1996. The Forest Service did not adopt PACFISH until February 24, 1995. *See* 60 Fed. Reg. 11655 (Mar. 2, 1995).

disagreement with NLAA determinations).[4] For example, although the Tucannon Biological Opinion called for wide riparian buffers and other mitigation measures for timber sales, units logged prior to the completion of consultation did not incorporate these protections. PRC ER 128 at 25 (units logged prior to the biological opinion did not insure adequate shade, sediment reduction, or recruitment of large woody debris).[5] Similarly, the Forest Service determined that 11 timber sales in the Grande Ronde basin were "not likely to adversely affect" the salmon. When NMFS reviewed the sales, it concluded that significant modifications were necessary to avoid harm to the fish. PRC ER 107 at 6, 26-31.

In other words, during the pendency of this case, the Forest Service routinely proceeded with site-specific actions based on the outdated LRMP standards and guidelines even though these prescriptions had never been assessed through the consultation process. As NMFS explained in the LRMP BO at 43-44:

> [S]ite-specific actions are still being developed using outdated management direction contained in the LRMPs. Prior site-specific consultations have made clear that site-specific actions that are consistent with the existing plans may lead to adverse effects on the listed salmon and their critical habitat.

In short, at the time the court of appeals ruled, the Forest Service was implementing numerous projects that could adversely affect listed salmon under the admittedly inadequate LRMPs and

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[4] Pacific Rivers Council, *et al.* (PRC) has lodged with the clerk of the Court copies of the Biological Opinion on Land and Resource Management Plans for the Boise, Challis, Nez Perce, Payette, Salmon, Sawtooth, Umatilla, and Wallowa-Whitman National Forests (LRMP BO) and the PACFISH Biological Opinion.

[5] At the time of the appeals court ruling, the Forest Service had received only two biological opinions from NMFS, one on ongoing activities in the Tucannon watershed of the Umatilla National Forest and one on 11 proposed timber sales in the Grande Ronde watershed of the Wallowa-Whitman National Forest.

had been doing so for over two years without completing *any* consultations with NMFS on the projects, the plans, or any promised amendments to the plans.

III. THE DECISION BELOW DID NOT REQUIRE DUPLICATIVE CONSULTATIONS OR AN INJUNCTION BARRING PROJECTS DURING CONSULTATION.

The district court held that the Forest Service violated the ESA by failing to consult on the Umatilla and Wallowa-Whitman LRMPs. Pet. App. 40a-41a. Relying on ESA § 7(d), 16 U.S.C. § 1536(d), the court refused to enjoin ongoing and announced projects under the plans that the Forest Service had determined "may effect," but were "not likely to adversely affect," the endangered salmon. *Id.* at 43a-44a.[6]

The court of appeals affirmed the district court's judgment that the Forest Service must reinitiate consultation with NMFS on the LRMPs. *Id.* at 16a. The court of appeals reasoned that consultation on the LRMPs would not be superfluous because the promised plan amendments, which were never presented to the court, would not necessarily revise all aspects of the LRMPs that may adversely affect the salmon. *Id.* at 13a n.12.

The court of appeals disagreed with the district court's conclusion that ongoing timber, range, and road projects that "may affect" the salmon could proceed *before* the Forest Service reinitiated consultation on the forest plans, *id.* at 14a:

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[6] ESA § 7(d) provides:

> *After* initiation of consultation required under [§ 7(a)(2)], the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [§ 7(a)(2)]. (emphasis added).

> As the ESA's plain language makes clear, § 7(d) applies only after an agency has initiated consultation under § 7(a)(2). As detailed above, the Forest Service has, as yet, failed to enter into consultation on the *LRMPs*.... (emphasis in original).

The court's decision expressly did "not preclude the district court from considering further modifications to its injunction, in accordance with our opinion, if and when consultation is reinitiated." *Id.* at 17a. Rather than decide what activities must be enjoined during the consultation period, the court remanded to the district court to determine in the first instance "if the ongoing or announced activities can proceed during the consultation period." *Id.* at 16a.

IV. SUBSEQUENT DEVELOPMENTS HAVE RENDERED THE CASE MOOT AND HAVE DEMONSTRATED THE VALUE OF FOREST PLAN CONSULTATIONS.

A. *Subsequent Judicial Proceedings*

The Forest Service reinitiated consultation with NMFS on the Umatilla and Wallowa-Whitman LRMPs on August 3, 1994, and PRC moved the district court for an injunction barring all "may affect" timber, range, and road projects until completion of the consultation. The Forest Service argued that reinitiation of consultation obviated the need for any injunction and that the court of appeals' opinion did not require otherwise. The Forest Service also submitted a stack of "§ 7(d) determinations" to the district court, purporting to show that the NLAA projects would not constitute an irreversible or irretrievable commitment of resources that would foreclose any reasonable and prudent alternative to protect the salmon.

On October 20, 1994, the district court enjoined all timber cutting and road construction activities and all "likely to adversely affect" grazing and timber removal until completion of consultation. The district court allowed NLAA grazing and removal of downed timber to continue based on its independent conclusion that these activities did not constitute an irreversible or

irretrievable commitment of resources. Pet. App. 58a-59a. The court declined to enjoin these activities despite its finding that the agency's record was sorely lacking; the court called the agency's "§ 7(d) determinations" "boilerplate," "conclusory," "devoid of actual site-specific analysis," and only "possible through the relatively modern advent of word processors." *Id.* at 57a. PRC, the Forest Service, and respondent Northwest Forest Resource Council, *et al.* (NFRC) appealed from the district court's opinion. Those appeals are currently pending.

In a companion case in Idaho, the district court framed its injunction in different terms. *Pacific Rivers Council v. Thomas*, 873 F. Supp. 365 (D. Idaho 1995) (*PRC Idaho*). The district court preliminarily enjoined all "may affect" logging, grazing, mining, and road projects in six national forests providing habitat for the endangered salmon until the Forest Service completed consultation on the LRMPs. However, the court invited the Forest Service to supplement the record and move for a modification of the injunction, *id.* at 372:

> Projects identified as "not likely to adversely affect" may be presented by motion or motions of the parties to the court for review to determine if they may proceed under § 7(d) pending completion of consultation under § 7(a)(2).

The Idaho district court subsequently stayed its injunction until March 15, 1995 to allow the Forest Service to complete consultation on the LRMPs. *PRC Idaho*, No. 94-0159-S-DAE (Jan. 25, 1995) (order staying injunction) (Lodged with the Clerk). The Forest Service and several intervenors have appealed from the district court's preliminary injunction. Those appeals are currently pending.

B. *The PACFISH And LRMP Biological Opinions*

On January 23, 1995, before this petition was filed, NMFS signed a biological opinion on the long-anticipated PACFISH strategy. NMFS specifically noted that consultation on PACFISH was not a substitute for consultation on the LRMPs:

> NMFS believes that section 7 consultations may be both required and appropriate at several levels [sic] this planning process, where such planning actions identify elements (e.g., standards and guidelines, management objectives and goals, land use allocations, etc., as well as actual ground-disturbing actions) that may affect listed species or designated critical habitat. Consultation on PACFISH is one of several consultations on the various components of land-use planning either completed or underway....

PACFISH BO at 24. Although PACFISH revised the LRMP standards and guidelines for activities within riparian areas, it did not alter the LRMP land allocations or commodity output goals or the standards for upland activities that may affect the salmon's habitat. NMFS identified a range of critical issues not addressed in PACFISH that would be addressed in the LRMP consultation. *Id.* at 13, 20, 22, 25, 27, 29, 31 (*e.g.*, designation of key watersheds requiring enhanced protection and restrictions on activities outside of riparian areas).

NFMS concluded that PACFISH was not likely to jeopardize the endangered chinook "in part on the assumption that some of the adverse effects from interrelated actions not prohibited by PACFISH will be addressed in consultation on the LRMPs." *Id.* at 33. NMFS directed the Forest Service to reinitiate consultation on PACFISH if the LRMP consultation was not finished by March 1, 1995, underscoring the inadequacy of the PACFISH consultation standing alone. *Id.*

On March 1, 1995, NMFS issued a 92-page biological opinion on the Umatilla and Wallowa-Whitman LRMPs and the six LRMPs at issue in the Idaho case. Like the PACFISH Biological Opinion, the LRMP opinion finds that:

> to help prevent extinction and promote the recovery of listed salmon, the [Forest Service] must consider both the immediate, localized effects of site-specific actions ... and the broad aggregated incremental effects to the species and its habitat. This latter factor may be best addressed in a plan-level analysis of the species' biological requirements across its range.

LRMP BO at 15; *see also id.* at 44, 45 ("Consideration of the needs of listed salmon is important at both levels of forest activity decisionmaking.") The opinion further concludes that "plan level consultation may reduce adverse effects at the site-specific level and increase agency efficiency by considering programmatic issues, identifying common characteristics of site-specific actions and evaluating potentially cumulative effects of numerous site-specific activities at the earliest opportunity." *Id.* at 14; *see also id.* at 65.

The LRMP Biological Opinion reiterates that the PACFISH consultation did not eliminate the need to consult on the entire plans: "Even though PACFISH substantially improves many of the standards and guidelines in the LRMPs, a comprehensive landscape-scale conservation strategy is still lacking." *Id.* at 45. PACFISH did not resolve conflicts between salmon protection and LRMP land allocations and commodity output goals. *Id.* at 45-46 ("Conflict between resource protection and outputs may continue even after adjustments required by PACFISH, if other resource areas are not adjusted to reflect requirements of anadromous fish.") These issues were necessarily addressed in the LRMP consultation. *E.g.*, *id.* at 73, 90 (establishing criteria for designation of priority watersheds and long-term adjustment of land allocations and output goals).

THE PETITION SHOULD BE DENIED

I. THE CASE IS MOOT.

The petition should be denied because the case has become moot. PRC filed this suit to compel the Forest Service to reinitiate consultation on its LRMPS and to halt projects during the consultation process that could harm the endangered Snake River chinook. NMFS has issued a biological opinion on the effects of the LRMPs, completing the consultation sought by PRC and ordered by the courts. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02. The injunction entered by the district court on remand has expired by its own terms, Pet. App. 60a; the Idaho court also has terminated its injunction. *PRC Idaho*, No. 94-0159-S-DAE (Mar. 8, 1995) (order dissolving injunction).

No live case or controversy remains between the parties. It does not matter that the Forest Service engaged in consultation

pursuant to a court order. Because the agency cannot undo its compliance and cannot return to its pre-consultation position, the case is moot. *Cf. Norfolk & Western Ry. v. American Train Dispatchers*, 499 U.S. 117, 111 S.Ct. 1156, 1163 n.3 (1991) (case not moot because petitioner was willing and able to resume its prior conduct if it prevailed in this Court); *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 333 U.S. 437 (1948) (same). As this Court has stated, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology v. United States*, - U.S. -, 113 S.Ct. 447, 449 (1992) (citations omitted).

Recognizing the mootness of this case, the petition asserts that the dispute is capable of repetition yet evading review. Petition at 30 n.22. This Court recognizes a narrow exception to the mootness doctrine where the controversy is likely to recur between the same parties. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990); *Lane v. Williams*, 455 U.S. 624, 634 (1982). PRC is no longer aggrieved, and forcing it to litigate a case on behalf of unknown future parties is inconsistent with the strictures of Article III. *Lane*, 455 U.S. at 634; *Honig v. Doe*, 484 U.S. 305, 317 (1988); *id.* at 332-33 (Scalia, J., dissenting).

Moreover, the issues presented in the petition are so narrow and fact-specific that they are unlikely to recur and are poorly suited to generic review. The petition concedes that the Forest Service regularly consults on the adoption, amendment, and revision of forest plans and must consult on site-specific forest activities. Petition at I, 15-16. The Forest Service does not object to consulting on the LRMPs themselves. *Id.* & 16 n.10. Rather, the agency's objection is to consultation on the LRMPs "in addition" to consultations on plan amendments and site-specific activities. *Id.* at I.

The case framed by petitioners is virtually certain *not* to recur. The next time a species is listed, the Forest Service may not amend its LRMPs. Similarly, the agency is not apt to adopt conservation strategies as a matter of course for newly listed species, especially given its failure to complete such strategies here. Watershed consultations are uniquely suited to fish and would have little utility for other listed species. Moreover, given

that NMFS ultimately concluded that the LRMP consultation was essential to assess the full effects of Forest Service plans on the newly listed salmon, NMFS' staff is unlikely to state in the future that plan consultations are unnecessary. *See id.* at 9-10.

The next time around, consultation on the LRMPs may be the only means of assessing the cumulative effects of forest activities on newly listed species. In *Silver v. Thomas*, Civ. No. 94-127712-5 (D. Ariz.), cited in the Petition at 30, the Forest Service is developing plan amendments to protect the threatened Mexican spotted owl, but has declared no intent to consult on either the amendments or the plans.[7] LRMP consultations would not be "in addition" to anything in that case and would advance the goals of ecosystem management espoused by the Forest Service. Petition at 20, 22-23.

This dispute also is unlikely to recur because the consultation required for newly listed species will rarely be as extensive as that needed for endangered salmon. The Forest Service asserts that the dispute will recur simply because many species are candidates for listing. *Id.* at 29. However, over 50% of the candidate species are located only in Hawaii or overseas where there are no national forests or Bureau of Land Management (BLM) lands. Many of the other candidate species have no habitat on national forest or BLM lands; still others ultimately will not be listed. Over 80% of the candidate species are plants, most of which have limited ranges on public lands. Landscape-level decisions made in the LRMPs may have no effect on such species. LRMP consultations may be

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[7] Similarly, the notice of intent to sue cited in the Petition at 30 presents radically different facts from this case. Over half of the species named in that letter were listed *before* adoption of and initial consultation on the LRMPs. In addition, plan-level consultation may not be required for several of the species because of their narrow ranges or the nature of the threats to their existence. For example, the Mount Graham red squirrel is found on a single mountain in the Coronado National Forest and is threatened primarily by construction of an astronomical observatory, not by forest plan activities. *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568 (9th Cir. 1993). Several other species are desert fish that are threatened primarily by irrigation development and stocking of non-native fish. *E.g.*, *Colorado Wildlife Fed'n v. Turner*, 23 Envtl. L. Rep. 20402 (D. Colo. 1992) (razorback sucker).

required only for mobile, wide-ranging species like the Snake River chinook, which evidence in the record shows are affected by the location, intensity, and design prescribed in the LRMP for numerous forest activities. *See infra* note 15.

For newly listed species affected by fewer forest activities than salmon, consultations on the plans or plan amendments may be accomplished quickly. Informal consultation resulting in short concurrence letters sufficed when the Umatilla and Wallowa-Whitman LRMPs were initially adopted, and the FWS consulted informally, rather than formally, on the PACFISH amendments. PRC Supp. ER 37(E), 37(F); 60 Fed Reg. 11655. As a result, the Forest Service may never again operate the forests for years without completing *any* plan-level consultation on the cumulative effects of forest activities on newly listed species.

Not only is this controversy unlikely to recur, but it need not have evaded review in this case nor must a similar dispute evade future review. This case did not become moot because of circumstances beyond the control of either party, such as a prisoner's release or a child reaching the age of majority. *Cf. Lane*, 455 U.S. at 624; *Honig*, 484 U.S. at 317. The Forest Service could have sought a stay from the court of appeals and this Court, enabling it to seek review before consulting on the LRMPs. *Cf. Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 656 n.6 (1974) (case not moot where petitioner obtained stay from Circuit Justice). This case has evaded review because the Forest Service failed to take adequate steps to preserve the status quo. The capable of repetition yet evading review exception does not apply.

Because this case became moot by virtue of petitioners' compliance with the ruling below, this Court should deny the petition rather than vacate the court of appeals' decision. This Court recently has explained that vacatur is ordinarily available only where the case has become moot by happenstance or the unilateral action of the prevailing party. *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, - U.S. -, 115 S.Ct. 386, 391-92 (1994). Where mootness results from an action within the petitioner's control, that party "has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari,

thereby surrendering his claim to the equitable remedy of vacatur." *Id.* at 392.

The Forest Service forfeited its right to review by complying fully with the court of appeals' decision. The agency cannot properly obtain vacatur by complying with the decision below and rendering the case moot, particularly where the case would not have warranted this Court's review had it remained a live controversy.

II. THE FIRST QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW.

The first question presented seeks review of whether the Forest Service had an obligation to reinitiate consultation on two LRMPs "*in addition*" to consulting on amendments to the plans and site-specific projects. That question is too narrow to provide useful guidance to the lower courts. Moreover, it contains assumptions at odds with the record actually before the court of appeals. The Forest Service admitted the inadequacy of the existing forest plans, and yet proceeded with projects without first completing consultation at any level. The court of appeals broke no new ground in deciding that the Forest Service must reconsult on the plans under such circumstances. That ruling is well-grounded in the ESA, the implementing regulations, expert agency practice, and judicial precedent, and can be satisfied with minimal disturbance to the management of the public lands. The Forest Service simply disagrees with the opinion below, even though it has been unable to convince a single judge to rule otherwise. Mootness aside, this issue is not worthy of this Court's review.

A. *The First Question Presented Is Too Narrow To Warrant Review.*

As framed in the petition, the point of contention is narrow. The issue is *not* whether the Forest Service should ever consult on forest plans. The Forest Service regularly consults on LRMPs when they are adopted, amended, or revised. Petition at I, 15-16. The agency itself stresses the importance of conducting plan-level or even ecosystem-wide consultations to ensure that its actions will not adversely affect endangered species. *Id.* at 22-23. And NMFS

concluded in both the PACFISH and LRMP biological opinions that plan-level consultations are necessary to assess the cumulative effects of land use activities on the listed salmon. PACFISH BO at 26; LRMP BO at 15.

The issue also is *not* whether the Forest Service has a duty to ensure that its ongoing activities are not likely to jeopardize newly listed species. The Forest Service concedes that ESA § 7(a)(2) imposes this responsibility and that the agency had to consult on ongoing activities in order to fulfill this obligation. Petition at 18 & n.12.

In addition, the issue is *not* whether revision of the forest plans was required in this case. The Forest Service admitted that its LRMPs required adjustment in order to protect the newly listed salmon and that consultation on the revisions would be necessary. Pet. App. 13a.

Finally, the issue presented in the petition is *not* whether reinitiation of consultation on the LRMPs would be necessary if the Forest Service had no intention to revise the plans. The only issue presented is whether the Forest Service had to consult on the existing forest plans "*in addition*" to consulting on promised future amendments to the plans. Petition at I.

No one disputes that the Forest Service must ensure, in consultation with NMFS, that its forest-wide activities are not likely to jeopardize the newly listed salmon. To the extent that the court of appeals' decision reiterated that consultation obligation, it is barely noteworthy. To the extent that the decision went further and directed the Forest Service to fulfill that obligation in a particular manner, the decision was unique to the particular facts of this case and was correct on those facts, as explained below. In either event, the decision does not merit this Court's review.

B. *Reinitiation Of Consultation On The LRMPs Was Not Duplicative, Meaningless, Or Unnecessary.*

The petition argues that review should be granted because the court of appeals imposed duplicative, meaningless, and unnecessary consultation requirements on the Forest Service. However, on the facts before the court of appeals and as they have evolved since, the LRMP consultation was necessary, meaningful,

and novel. No other programmatic consultations had occurred at the time the court of appeals ruled, and the subsequent plan amendments did not address the full effects of the LRMPs on the listed salmon. *See supra* pp. 6-7, 11-13. To the extent the court of appeals required consultation on existing LRMPs, it did so only in light of the history of consultation here and the particular needs of the salmon, not as a general requirement applicable to all species under all circumstances.

The Forest Service admitted to the court of appeals that its forest plans needed "adjustment" and that it must consult with NMFS on those revisions. Pet. App. 13a. Despite this acknowledgement, the Forest Service had not adopted, implemented, or consulted on *any* plan revisions at the time of the court of appeals decision, nor had the agency committed to any timetable for completing such revisions. *See supra* pp. 6-8. Furthermore, the agency was proceeding with dozens of timber, road, and grazing projects without completing even site-specific consultations. Pet. App. 6a n.6. Compounding matters, in the two project-level consultations that had been completed, NMFS concluded that projects the Forest Service had deemed "not likely to adversely affect" the salmon needed to be changed to ensure that they would, in fact, not harm the endangered fish. *See* PRC ER 107, 128; LRMP BO at 40.

The petition asks this Court to review whether the Forest Service is required to reinitiate consultations on LRMPs "in addition" to consultations on plan amendments and site-specific projects, but this question is at odds with the posture of the case as it appeared before the court of appeals. That court decided whether the Forest Service could continue managing the forests under the existing, inadequate LRMPs for an indefinite period of time without consulting with NMFS on the decisions made in the plans.

Also implicit in the first question presented is the assumption that consultation on the existing LRMPs would merely duplicate consultations on plan amendments and site-specific actions. However, the agency offered the court of appeals no assurances that either the site-specific consultations or the promised LRMP revisions would address all relevant standards, land allocations, and commodity output goals established in the forest plans. In

fact, as the PACFISH and LRMP biological opinions make clear, the site-specific and PACFISH consultations did not reach all such decisions that "may affect" the salmon. *See supra* pp. 11-13.

In the opinion of the expert fish and wildlife agency, consultation on the LRMPs was far from unnecessary, duplicative, or meaningless. *Id.* Ultimately, NMFS validated the court of appeals' decision by concluding that PACFISH addressed only some of the plans' adverse effects and that consultation on the LRMPs themselves was meaningful and necessary to evaluate the unamended aspects of the plans.

C. *The Decision Below Is Well-Grounded In The ESA, Its Regulations, Agency Practice, And The Case Law.*

The court of appeals decision is solidly grounded in the applicable statute, the implementing regulations, the practice of the responsible federal agencies, and the case law.

Section 7(a)(2) requires the federal agencies to insure, in consultation with the expert fish and wildlife agencies, that "any action" authorized or carried out by the agency is not likely to jeopardize a threatened or endangered species. 16 U.S.C. § 1536(a)(2). This Court has recognized the broad and mandatory sweep of this provision. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 & n.18 (1978).

Under the joint consultation regulations, "[r]einitiation of formal consultation is required ... where discretionary Federal involvement or control over the action has been retained or is authorized by law and ... a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16.[8] A two-page letter from a regional director cannot trump this regulation. Petition at 9-10, 16-17, 20, 23 (discussing letter from NMFS regional director). The letter

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[8] NFRC argues that the joint regulations are not binding on the Forest Service. However, the court of appeals held that the Forest Service violated ESA § 7(a)(2), not the implementing regulations. Pet. App. 12a-13a. The court's decision was properly informed by the expert regulations. Pet. App. 10a.

mentions neither the regulation nor the FWS' previous application of the rule to forest plans, and has been superseded by subsequent, more informed events. As explained above, NMFS has repudiated the isolated view of this solitary official in the 40-page PACFISH Biological Opinion and 92-page LRMP Biological Opinion.

Under 50 C.F.R. § 402.16, reinitiation of consultation was required because the Forest Service retains the discretion to amend its LRMPs at any time. *See* 36 C.F.R. § 219.10(f)-(g). The LRMPs affect all forest management activities for ten to fifteen years and shape the impacts of those activities on newly listed species. The court of appeals properly held that the Forest Service must reinitiate consultation on the LRMPs to ensure, "in consultation with and with the assistance of the Secretary," that implementation of the plans is not likely to jeopardize the continued existence of the endangered Snake River chinook. 16 U.S.C. § 1536(a)(2).[9]

The ruling is also consistent with expert agency practice. In its biological opinion on the impacts of the Flathead LRMP, the FWS concluded, "[r]einitiation of formal consultation is required if ... a new species is listed or critical habitat designated that may be affected by the action." Flathead BO at 31. The court of appeals required nothing more than the agencies charged with implementing the Act believe is necessary.

Finally, the court of appeals acted consistent with its own precedents in holding that the Forest Service must reinitiate consultation on the LRMPs. The Ninth Circuit repeatedly has held that agencies must consult on their programmatic land management plans in order to protect listed species from the cumulative effects

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[9] In their brief discussion of 50 C.F.R. § 402.16, petitioners contend that the regulation does not apply to this case because the original consultations on the Umatilla and Wallowa-Whitman LRMPs were informal, not formal. Petition at 18 n.12. Under this interpretation, an agency would never have to reinitiate consultation on any action which was thought to have minor effects on a listed species, even if subsequent information showed that the action was likely to jeopardize that or a newly listed species. Such a result would be wholly inconsistent with the agency's ongoing duty under ESA § 7(a)(2) to avoid jeopardy from its actions to all endangered species.

of activities undertaken pursuant to the plans. *See Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (1992) (BLM must consult on multi-year timber sale management plan); *Resources Ltd. v. Robertson*, 8 F.3d 1394, 1399-1400 (1993) (Forest Service must consult on LRMP timber goals that may conflict with the preservation of threatened species). The decision that this obligation continues after initial approval of a plan follows from Ninth Circuit precedents and is consistent with the decisions of other circuits. *See Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989) (consultation on mineral leases must encompass not only issuance of the leases, but prospective post-leasing activities); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (pursuant to ESA § 7, Forest Service ordered to prepare, in consultation with FWS, new timber management plan for national forests of Texas to respond to dramatic declines in threatened woodpecker caused by existing management direction).[10]

The court of appeals rendered a decision that is perfectly consistent with the plain language of the statute, the implementing regulations, prior agency practice, and previous judicial opinion. Because the court below did not depart from the accepted course of judicial proceedings, there is no need for this Court's review.

D. *Consulting On The Effects Of LRMPs On Newly Listed Species Will Not Unduly Disrupt Forest Management.*

The Forest Service complains that the ruling below has "substantially disrupted the management of federal lands and ... threaten[s] far-reaching consequences for the administration of

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[10] The petition cites *Sierra Club v. Robertson*, 28 F.3d 753 (1994), in which the Eighth Circuit arguably created a split with the Seventh and Ninth Circuits over whether environmental groups have standing to challenge LRMPs under NFMA and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* *See Resources Ltd.*, 8 F.3d at 1394; *Idaho Conservation League*, 956 F.2d at 1516; *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995). Standing was not an issue before the court of appeals in this case and is not a question presented by this petition.

more than 284 million acres of public lands in the Ninth Circuit." Petition at 3. These fears are vastly overblown.

Consulting on LRMPs that may adversely affect newly listed species need not disrupt forest management. As discussed above, *supra* pp. 14-16, it is far from clear that forest plan consultation will be required with great frequency upon the listing of new species. Most candidate species have no habitat on national forests, and few have wide-ranging habitat affected by the bulk of the activities in a forest.

Even where consultation is required, that process is, by statute, a short and flexible one. Consultations must normally be completed within 90 days. 16 U.S.C. § 1536(b)(1).[11] Since ESA citizen suits must be preceded by 60-days notice, the agencies have a statutory grace period to complete consultation before a lawsuit can even be commenced. 16 U.S.C. § 1540(g)(2).

In addition, the quick and flexible procedures of informal consultation will often be appropriate. The Umatilla and Wallowa-Whitman LRMPs initially received brief concurrence letters from the FWS, and the FWS also provided a brief concurrence on PACFISH. *See supra* pp. 15-16. More complex consultations will only be necessary for those few species that are widely distributed throughout a forest and are affected by a variety of decisions made in the forest plans.

Under the ESA, conferring with NMFS or the FWS also should begin before a final listing decision is made. 16 U.S.C. § 1536(a)(4) (conference on species proposed for listing). The result of that conference may be adopted as a final biological opinion once the species is listed. 50 C.F.R. § 402.10(d). Because there is no prohibition on action during the conference period, 16 U.S.C. § 1536(a)(4), the Forest Service has up to one year between the proposed and final listings to obtain a biological

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[11] Consultation on the LRMPs in this case took longer than 90 days because this was the first time that NMFS, an agency that normally deals with marine species and the ocean environment, consulted on forest plans. Moreover, the consultations addressed eight separate LRMPs, and the salmon are uniquely vulnerable to a broad range of activities governed by the forest plans.

opinion or concurrence on its LRMPs without disrupting any forest activities.[12]

Finally, as NMFS stressed, LRMP consultations will expedite subsequent project-level consultations. LRMP BO at 15, 65. Plan-level consultations will not waste agency time and resources, as petitioners complain, but will result in more efficient use of those resources down the road.

III. THE SECOND QUESTION PRESENTED WAS NOT DECIDED BY THE COURT OF APPEALS AND IS NOT RIPE FOR THIS COURT'S REVIEW.

The Forest Service contends that "the court of appeals misapplied established equitable principles by directing the district court to enjoin, pending completion of the consultation process, site-specific activities that the Forest Service has determined are not likely to adversely affect the newly listed species." Petition at I. The court of appeals gave no such direction, and the issue is still percolating through the lower courts.

A. *The Court Of Appeals Did Not Decide The Second Question Presented.*

Because the Forest Service had not reinitiated consultation on the LRMPs, the court of appeals focused exclusively on the scope of injunction pending the *commencement*, not the *completion*, of such consultations. Pet. App. 14a-17a. That issue certainly does not warrant this Court's attention since, as in this case, reinitiating consultation takes only a matter of days.

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[12] The disruption feared by the Forest Service stems not as much from the consultation process as from injunctions against forest activities during that process. Petition at 14, 24, 25, 29-30. This risk can be eliminated through compliance with 16 U.S.C. § 1536(a)(4). Moreover, because the court of appeals did not decide what activities must be enjoined during plan consultations, that issue is not properly before this Court. *See infra* pp. 24-28.

Whether projects must be enjoined during consultation was not decided until the remand from the decision at issue here. The court of appeals expressly left it to the district court to decide which activities should be enjoined if and when the Forest Service reinitiated consultation. *Id.* The court emphasized the limited scope of its holding in the final sentence of its opinion: "This shall not preclude the district court from considering further modifications to its injunction, in accordance with our opinion, if and when consultation is reinitiated." *Id.* at 17a. Indeed, the petition primarily focuses on the district court opinion on remand, not the appeals court decision subject to review here. Petition at 24-25. This Court should refuse petitioners' invitation to review a decision the court of appeals did not make.[13]

B. *The Scope Of Injunctive Relief During The Consultation Process Is Still Percolating Through the Lower Courts.*

The second question presented suggests that the court of appeals directed the district court to enjoin all "not likely to adversely affect" projects until the agencies completed consultation on the LRMPs. The court of appeals never issued such a direction, and the district court certainly never received it. The district courts in this and the related Idaho case did not mechanically enjoin NLAA activities, as suggested by the petition, but treated NLAA projects differently based on their independent interpretations of the ESA and the records before them.

On remand, the district court in this case accepted further briefing on the appropriate scope of injunctive relief during the consultation process. Contrary to its contentions in the petition, the Forest Service argued strenuously that the court of appeals' opinion did not compel any injunction once consultation was resumed, and that any statements to the contrary were "*dicta*" that

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[13] The court of appeals also never considered NFRC's theory that an injunction would harm the salmon by preventing the beneficial environmental effects of logging because NFRC never made this argument to the court of appeals. *See* Brief of Intervenors/Appellees (9th Cir. Feb. 16, 1994).

need not be followed by the district court. Defendants' Opposition to Motion for Permanent Injunction at 18 (D. Or. Sept. 9, 1994).

The district court issued an opinion enjoining all "may affect" tree felling and road construction, including NLAA projects. The court refused to enjoin NLAA grazing and removal of downed timber because, it concluded, those activities did not constitute an irreversible or irretrievable commitment of resources. Pet. App. 60a. The net result is that the district court enjoined a total of 16 timber sales for just over four months.

The district court did not rest its injunction solely on the court of appeals' decision. *Id.* at 51a, 54a-55a. According to the district judge, "even if I went past the Ninth Circuit's conclusion that *per se* irreversible timber harvests justify an injunction under § 7(d), I would nevertheless conclude that defendants fail to satisfy the second prong of the § 7(d) analysis...." *Id.* at 54a. Rather than view the court of appeals' decision as a straightjacket, the district judge exercised his equitable discretion to permit continued grazing and timber removal and to take an independent look at the issue of tree felling.[14]

Neither did the court of appeals' opinion prevent the Idaho district judge from exercising his equitable discretion. That judge invited motions to modify his injunction to exempt NLAA activities and temporarily stayed the injunction to give the Forest Service time to complete the LRMP consultation. *PRC Idaho*, 873 F. Supp. at 372; *id.*, Order (Jan. 25, 1995).

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[14] Petitioners complain that individual projects that the Forest Service has decided are "not likely to adversely affect" the endangered salmon should not be enjoined. Petition at 24-25. Petitioners fail to note that NMFS has not concurred in the vast majority of these NLAA determinations even though they admit that written concurrence is necessary to close the consultation loop. *Id.* at 6; 50 C.F.R. § 402.14(b). Moreover, NMFS disagreed with the Forest Service's NLAA determinations in the only two project-level consultations presented to the courts below. PRC ER 107, 128. The Forest Service has never presented to any court the issue of whether projects which *have* received NMFS' concurrence should be treated differently than the bulk of projects which never have received concurrence from NMFS.

In both instances, the district courts were guided as much by the records in front of them as by the court of appeals' decision. The Oregon district court expressly deferred to the Forest Service's determinations that its timber sales "may affect" the endangered salmon. The court concluded that it could not effectively "reclassify" these agency determinations as "no effect" designations by allowing the NLAA projects to proceed. Pet. App. 56a-57a. The Idaho district court, by contrast, indicated that it would allow activities to proceed under ESA § 7(d), but only after the Forest Service provided it with a record to support such determinations.[15]

PRC, the Forest Service, and NFRC have appealed from the Oregon district court's order on remand, and the Forest Service and intervenors have appealed the Idaho decision. Those appeals raise the same issue that the Forest Service seeks to present to this Court. This flurry of district court decisions and appeals underscores that this Court's review of the second question presented would be premature.

The court of appeals did not decide the proper scope of injunctive relief once consultation has been reinitiated and did not direct an injunction barring all NLAA projects. Since the court of appeals' decision, two district courts have exercised their equitable discretion based on the records before them and issued injunctions of varying scopes. The Ninth Circuit may have an opportunity to review the issue in the appeals of those orders or in the future. Until that happens, there is nothing for this Court to review. *Black v. Cutter Lab.*, 351 U.S. 292, 297 (1956) (Court "reviews judgments, not statements in opinions"); *Etsi Pipeline Project v.*

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[15] In addition, both courts possessed extensive expert testimony, submitted by PRC and never rebutted by defendants, that continued implementation of the LRMPs would jeopardize the endangered salmon and foreclose reasonable and prudent alternatives that could avoid this result. *E.g.*, PRC ER 48, 113, 116, 126 (declarations of Jonathan J. Rhodes and Dale McCullough). The Forest Service can claim that the courts below ordered injunctive relief "in the absence of any showing of likely harm to the species" only by ignoring this lengthy and uncontroverted testimony. Petition at 27.

Missouri, 484 U.S. 495, 516 n.11 (1988) (lower court statements "were pure dictum and there is no reason to address them here").

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

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APRIL 1995

APPENDIX

50 C.F.R. § 402.16 provides:

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.